



FEDERAL MARITIME COMMISSION
BUREAU OF ENFORCEMENT

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Washington, D.C. 20573-0001

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

June 23, 2011

Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol St, NW
Washington, DC 20573

RE: FMC Docket No. 11-04, *Worldwide Logistics Co., Ltd. Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*

Dear Ms. Gregory,

Pursuant to 46 C.F.R. 502.2(e), we hereby submit an original and five (5) copies of the Settlement Agreement and the parties' Joint Memorandum in Support of Proposed Settlement. As the settlement resolves all outstanding matters at issue in Docket 11-04, Respondent and the Bureau of Enforcement seek dismissal of this proceeding upon approval of the settlement by the Presiding Judge and the Commission.

In accordance with numbered paragraph 1 of the settlement, the Bureau of Enforcement acknowledges receipt of the settlement monies which Respondent made by wire transfer.

Respectfully submitted,

Peter J. King, Director
Brenda Doty, Trial Attorney
Bureau of Enforcement

cc: Hon. Erin M. Wirth
Administrative Law Judge

Jacky Lim, Managing Director
Nick Cui, Deputy General Manager
Respondent, Worldwide Logistics Co., Ltd.

Attachments

ORIGINAL

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FEDERAL MARITIME COMMISSION

OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

DOCKET NO. 11-04

Worldwide Logistics Co., Ltd. – Possible Violations of
Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984

**JOINT MEMORANDUM IN SUPPORT OF
PROPOSED SETTLEMENT**

Worldwide Logistics Co., Ltd. (Respondent) and the Bureau of Enforcement (BOE) hereby submit this joint memorandum in support of the proposed settlement agreement. The parties believe that the proposed agreement meets the Federal Maritime Commission's (Commission) criteria for approval of agreements resolving administrative enforcement claims and, therefore, should be approved.

INTRODUCTION

By Order of Investigation and Hearing dated March 30, 2011, the Commission commenced an investigation to determine: 1) whether Respondent violated section 10(a)(1) of the Shipping Act by obtaining transportation at less than the rates and charges otherwise applicable by an unjust or unfair device or means; 2) whether Respondent violated section 10(b)(2) of the Shipping Act by providing service other than at the rates, charges, and classifications set forth in its published NVOCC tariff or applicable NSA; 3) whether, in the event violations of sections 10(a)(1), or 10(b)(2) of the Shipping Act are found, civil penalties

should be assessed against Respondent and, if so, the amount of penalties to be assessed; 4) whether, in the event violations of sections 10(a)(1) or 10(b)(2) of the Shipping Act are found, the tariff(s) of Respondent should be suspended; and 5) whether, in the event violations are found, an appropriate cease and desist order should be issued.

In the Order of Investigation and Hearing, the Commission made BOE a party to the proceeding. Since the Order of Investigation and Hearing, BOE and Respondent have engaged in the process of discovery and have conducted frequent settlement discussions.

The settlement agreement accompanying this memorandum is the result of those good faith negotiations and reflects each party's view of the case and its fair resolution. For its part, BOE avers that at an evidentiary hearing it would submit a compelling case in support of its allegations that Respondent did knowingly and willfully violate sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984. Specifically, BOE asserts that it would show that Respondent knowingly and willfully misdescribed cargo to obtain ocean transportation at less than the rates and charges otherwise applicable, and that Respondent knowingly and willfully provided service other than at the rates, charges, and classifications set forth in its published NVOCC tariff. Conversely, Respondent avers that at an evidentiary hearing they would introduce evidence to prove that Worldwide did not knowingly and willfully violate any law or regulation as alleged in this proceeding, or that they would assert other facts and argument disputing or claiming mitigation with respect to the violations alleged.

At this time, significant procedural steps remain in this proceeding, including: the majority of Worldwide's responses to BOE's discovery requests, the submission of pre-hearing statements, as well as the briefing and submission of the parties' respective cases. Therefore, Respondent and BOE believe it is in the best interests of the parties and the shipping public to

resolve this proceeding rather than engage in further litigation. Upon approval of the proposed settlement by the Presiding Judge and the Commission, Respondent and BOE seek dismissal of Docket 11-04.

AUTHORITY FOR SETTLEMENT

The Administrative Procedure Act (APA), 5 U.S.C. § 554(c)(1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the APA makes clear, Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

[E]ven where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication. . . . The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248-79, at 24 (2d Sess. 1946).

Courts have endorsed the use of the APA settlement provision "to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

The Commission itself has also long recognized that the law strongly favors settlements:

'The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.'

Old Ben Coal Company v. Sea-Land Services, Inc., 18 S.R.R. 1085, 1092 (1978) (citation omitted). See also, *Del Monte Corp. v. Matson Navigation Co.*, 19 S.R.R. 1037, 1039 (1979); *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 20 S.R.R. 1025, 1032-33 (Initial Decision; administratively final June 30, 1981).

The Commission's regulations reflect its policy of encouraging settlements. 46 C.F.R. § 502.91. Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has frequently approved settlements of administrative and investigative proceedings.¹ They also recognize the designated role of BOE in formal proceedings and, necessarily, in the settlement of those proceedings. 46 C.F.R. §§ 502.42 and 502.61. The regulations also require that the Presiding Officer approve all such settlement agreements in formal proceedings. 46 C.F.R. § 502.603(a).

¹ See *Eastern Forwarding International, Inc. - Independent Ocean Freight Forwarding Application - Possible Violations, Section 44, Shipping Act, 1916*, ("Eastern Forwarding"), 20 S.R.R. 283, 286 (Initial Decision; administratively final Sept. 8, 1980); *Far Eastern Shipping Co. - Possible Violations of Sections 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act, 1916*, ("FESCO"), 21 S.R.R. 743, 764 (Initial Decision; administratively final, May 7, 1982); *Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line, ("Armada")* 23 S.R.R. 946, 949 (Initial Decision; administratively final Apr. 25, 1986); *Member Lines of the Transpacific Westbound Rate Agreement - Possible Violations of the Shipping Act of 1984, ("TWRA")*, 23 S.R.R. 1329, 1340 (Initial Decision; administratively final Oct. 9, 1986); *Royal Caribbean Cruises Ltd. Possible Violations of Certification Requirements, ("Royal Caribbean")*, 26 S.R.R. 64 (Order Approving Settlement and Discontinuing Proceeding, Dec. 4, 1991).

CRITERIA FOR APPROVAL OF SETTLEMENT

To discharge the duty imposed by 46 C.F.R. § 502.603(a), the Presiding Officer must decide whether the proposed settlement satisfies the appropriate criteria for approval. In so deciding, the Presiding Officer generally "reviews a settlement agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to determine that the settlement agreement was not a product of fraud, duress, undue influence, or mistake." *World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing (a.k.a. Johnny Yu) – Possible Violations of Section 10 of the Shipping Act of 1984 ("World Chance")*, 31 S.R.R. 1346, 1350 (FMC 2010) (citations omitted). The Presiding Officer will also review the terms of a settlement agreement, "to ensure that the terms are fair, reasonable, and adequate. The review process frequently involves a balancing of the likelihood of success on the merits against the cost and complexity of proceeding to final judgment." *Id.*

In Commission-initiated proceedings such as the instant one, the Presiding Officer must also decide whether the proposed settlement agreement satisfies the appropriate criteria for approval with regard to the issue of penalty assessment. A summary of the Commission's view of the relationship between the criteria for assessment of penalties and the criteria for approving settlements appears in the initial decision in *Armada*:

As seen, Section 13(c) of the Act and § 505.3 of the Commission's regulations, which implements both Section 13 of the Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission. Section 32(e) of the 1916 Act was enacted in 1977. The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 C.F.R. § 505, in 1979. Under those rules the 'criteria for compromise, settlement or assessment' might 'include but need not be limited to those which are set forth in 4 C.F.R. Parts 101-105.' . . . Those standards, particularly, the standards enumerated in 4 C.F.R. § 103, were a part of the Commission's program for settlement and

collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. 'They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings.'

Armada, supra, 23 S.R.R. at 956 (footnote omitted) (emphasis in original) (quoting *Eastern Forwarding and Behring International, supra*). See also, *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 866 (Initial Decision; administratively final Mar. 26, 1986).

In *FESCO*, the Commission summarized the appropriate criteria for approving proposed settlements where a penalty assessment is present as follows:

[S]ettlement may be based upon a determination that the agency's 'enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon'; that 'the amount accepted in compromise. . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection'; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled 'for one or for more than one of the reasons authorized in this part.'

FESCO, supra, 21 S.R.R. at 759 (footnotes omitted). Subsequent to *FESCO*, the Commission reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in the negotiation of a settlement, and in view of a settlement agreement. *Investigation of Unfiled Agreements - Yangming Marine Transport, Evergreen Marine Corporation and Orient Overseas Container Line, Inc.*, ("Yangming") 24 S.R.R. 910 (Order Adopting Initial Decision, Mar. 30, 1988). See also, *Royal Caribbean, supra*.

In accordance with the Commission's analysis as enunciated in *World Chance, FESCO, Eastern, Armada, Yangming*, and *Royal Caribbean, supra*, proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence by respondents, the

industry, and the shipping public² with the litigative probabilities, litigative and administrative costs, and such other matters as justice may require. That balance favors approval of this proposed settlement.

As stated in the Introduction, significant procedural steps remain in this proceeding, including: the majority of Worldwide's responses to BOE's discovery requests, the submission of pre-hearing statements, as well as the briefing and submission of the parties' respective cases. The potential litigative and administrative costs of this proceeding thus weigh heavily in favor of approval of this proposed settlement agreement.

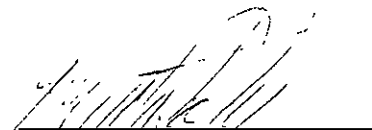
With respect to the policy of enforcement, the Bureau of Enforcement stresses the importance of ensuring compliance with the Shipping Act of 1984. Respondent supports the Commission's objectives, acknowledges BOE's case against Worldwide, and has committed to maintain measures designed to eliminate the practices by Respondent which are the basis for the alleged violations set forth herein. In addition, Respondent has agreed to pay a significant civil penalty which will have a deterrent effect upon this respondent, and on the industry as a whole. The settlement amount "will have the desired effect on Respondent and others because it would serve as a disincentive to future unlawful activity." *World Chance*, 31 S.R.R. at 1352, (quoting *FESCO*, 21 S.R.R. at 759) (internal quotations omitted). Accordingly, the parties submit that the proposed settlement agreement will further the Commission's enforcement policy.

² The parties note that there are no shipper complaints filed with the FMC against Respondent. For that reason, such third-party complaints were not a basis for the allegations in the Order of Investigation and Hearing, and were not part of the settlement discussions between the parties. No third party has come forward to contest the approval of the proposed settlement. Accordingly, the parties submit that the shipping public will not now be harmed by the approval of this settlement agreement. See *World Chance*, 31 S.R.R. at 1351-52.

CONCLUSION

The proposed settlement agreement comprehensively addresses the issues relating to the above-referenced proceeding and meets the Commission's well established criteria for approval of agreements settling administrative enforcement claims and, therefore, should be approved and certified to the Commission. Upon approval of the settlement, Docket No. 11-04 should be discontinued in its entirety.

Respectfully submitted,



Peter J. King, Director
Brenda Doty, Trial Attorney
Bureau of Enforcement



Jacky Lim, Managing Director
Nick Cui, Deputy General Manager
Worldwide Logistics Co., Ltd.,
Respondent

Dated: June 23, 2011